

CHAPTER 4

FUNDING AND FUND LIMITATIONS

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CHAPTER 4

FUNDING AND FUND LIMITATIONS

I. INTRODUCTION.

A. The Appropriations Process.

1. U.S. Constitution, Art. I, § 8, grants to Congress the power to “. . . lay and collect Taxes, Duties, Imports, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States”
2. U.S. Constitution, Art. I, § 9, provides that “[N]o Money shall be drawn from the Treasury but in Consequence of an Appropriation made by Law. . . .”

B. The Supreme Court’s Fiscal Philosophy: “The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.” United States v. MacCollom, 426 U.S. 317 (1976).

C. Historical Perspective.

1. For many years after the adoption of the Constitution, executive departments exerted little fiscal control over the monies appropriated to them. During these years, departments commonly:
 - a. Obligated funds in advance of appropriations.
 - b. Commingled funds and used funds for purposes other than those for which they were appropriated.

- c. Obligated or expended funds early in the fiscal year and then sought deficiency appropriations to continue operations.
- 2. Congress passed the Antideficiency Act (ADA), 31 U.S.C. §§ 1301, 1341, 1342, 1350, 1351, and 1511-1519, to curb the fiscal abuses by the executive departments which frequently created “coercive deficiencies” that required supplemental appropriations. The Act consists of several statutes that authorize administrative and criminal sanctions for the unlawful obligation and expenditure of appropriated funds.

II. KEY TERMINOLOGY.

- A. Fiscal Year (FY). The Federal Government’s fiscal year begins on 1 October and ends on 30 September.
- B. Period of Availability. Most appropriations are available for obligation for a limited period of time, *e.g.*, one fiscal year for operation and maintenance appropriations. If activities do not obligate the funds during the period of availability, the funds expire and are generally unavailable for obligation thereafter.
- C. Obligation. An obligation is any act that legally binds the government to make payment. Obligations may include orders placed, contracts awarded, services received, and similar transactions during an accounting period that will require payment during the same or a future period. DOD Financial Management Regulation 7000.14, vol. 1, p. xvii.
- D. Budget Authority.
 - 1. Congress finances federal programs and activities by granting “budget authority.” Budget authority is also called obligational authority.
 - 2. Budget authority means “. . . authority provided by law to enter into obligations which will result in immediate or future outlay involving government funds” 2 U.S.C. § 622(2).

- a. OMB Cir. A-11, Preparation, Submission and Execution of the Budget (June 2002), § 20.4 [hereinafter OMB Cir. A-11], available at <http://www.whitehouse.gov/omb/circulars/a11/02toc.html>.
 - b. “Contract authority,” as noted above, is a limited form of “budget authority.” Contract authority permits agencies to obligate funds in advance of appropriations but not to disburse those funds absent appropriations authority. See, e.g., 41 U.S.C. § 11 (Feed and Forage Act).
3. Agencies do not receive cash from appropriated funds to pay for services or supplies. Instead they receive the authority to obligate a specified amount.

E. Authorization Act.

1. An authorization act is a statute, passed annually by Congress, that authorizes the appropriation of funds for programs and activities.
2. An authorization act does not provide budget authority. That authority stems from the appropriations act.
3. Authorization acts frequently contain restrictions or limitations on the obligation of appropriated funds.

F. Appropriations Act.

1. An appropriations act is the most common form of budget authority.
2. An appropriation is a statutory authorization to “incur obligations and make payments out of the U.S. Treasury for specified purposes.” The Army receives the bulk of its funds from two annual Appropriations Acts: (1) the Department of Defense Appropriations Act; and (2) the Military Construction Appropriations Act.

3. The making of an appropriation must be stated expressly. An appropriation may not be inferred or made by implication. Principles of Fed. Appropriations Law, vol. I, p. 2-13, GAO/OGC 91-5 (1991).

G. Comptroller General and Government Accountability Office (GAO).

1. Investigative arm of Congress charged with examining all matters relating to the receipt and disbursement of public funds.
2. Established by the Budget and Accounting Act of 1921 (31 U.S.C. § 702) to audit government agencies.
3. Issues opinions and reports to federal agencies concerning the obligation and expenditure of appropriated funds.

III. ADMINISTRATIVE CONTROL OF APPROPRIATIONS.

A. Methods of Subdividing Funds.

1. Formal subdivisions. Appropriations are subdivided by the executive branch departments and agencies.
 - a. These formal limits are referred to as apportionments, allocations, and allotments.
 - b. Exceeding a formal subdivision of funds violates the ADA. 31 U.S.C. § 1517(a)(2).
 - c. Informal subdivisions. Agencies may subdivide funds at lower levels, *e.g.*, within an installation, without creating an absolute limitation on obligational authority. These subdivisions are considered funding targets. These limits are not formal subdivisions of funds.

- d. These targets also may be referred to as allowances.
- e. Incurring obligations in excess of a target is not necessarily an ADA violation. If a formal subdivision is breached, however, an ADA violation may occur, and the person responsible for exceeding the target may be held liable for the violation.
- f. Army policy allows formal subdivisions of funds at the Major Command (MACOM) level and above.

B. Accounting Classifications.

- 1. Accounting classifications are codes used to manage appropriations. They are used to implement the administrative fund control system and to ensure that funds are used correctly.
- 2. An accounting classification is commonly referred to as a **fund cite**. DFAS-IN 37-100-XX, The Army Mgmt. Structure, provides a detailed breakdown of Army accounting classifications. The XX, in DFAS-IN 37-100-XX, stands for the last two digits of the fiscal year, e.g., DFAS-IN 37-100-02 is the source for accounting classification data for FY 2002 for the Department of the Army. DFAS-IN 37-100-XX is published annually.

C. Understanding an Accounting Classification.

1. The following is a sample fund cite:

	21	4	2020	67	1234	P720000	2610	S18001
AGENCY	└─┘		└─┘	└─┘	└─┘	└─┘	└─┘	└─┘
FISCAL YEAR	└─┘		└─┘	└─┘	└─┘	└─┘	└─┘	└─┘
TYPE OF APPROPRIATION	└─┘		└─┘	└─┘	└─┘	└─┘	└─┘	└─┘
OPERATING AGENCY CODE	└─┘		└─┘	└─┘	└─┘	└─┘	└─┘	└─┘
ALLOTMENT NUMBER	└─┘		└─┘	└─┘	└─┘	└─┘	└─┘	└─┘
PROGRAM ELEMENT	└─┘		└─┘	└─┘	└─┘	└─┘	└─┘	└─┘
ELEMENT OF EXPENSE	└─┘		└─┘	└─┘	└─┘	└─┘	└─┘	└─┘
FISCAL STATION NUMBER	└─┘		└─┘	└─┘	└─┘	└─┘	└─┘	└─┘

- a. The first two digits represent the military department. The “**21**” in the example shown denotes the Department of the Army.
- b. Other department codes are:
 - (1) 17 - Navy
 - (2) 57 - Air Force
 - (3) 97 - Department of Defense
- c. The third digit shows the fiscal year/period of availability of the appropriation. The “**4**” in the example shown indicates FY 2004 funds.
 - (1) Annual appropriations are used frequently in installation contracting.

(2) Other fiscal year designators encountered less frequently in installation contracting include:

(a) Third Digit = X = No year appropriation. This appropriation is available for obligation indefinitely.

(b) Third Digit = 8/2 = Multi-year appropriation. In this example, funds were appropriated in FY 1998 and remain available through FY 2002.

d. The next four digits reveal the type of the appropriation. The following designators are used within DOD fund citations:

	<u>ARMY</u>	<u>NAVY/MC</u>	<u>AIR FORCE</u>	<u>OSD</u>
Military Personnel	2010	1453/1105	3500	N/A
Reserve Personnel	2070	1405/1108	3700	N/A
National Guard Personnel	2060	N/A	3850	N/A
O&M*	2020	1804/1106	3400	0100
O&M, Reserve	2080	1806/1107	3740	N/A
O&M, National Guard	2065	N/A	3840	N/A
Procurement (Aircraft)	2031	1506	3010	N/A
Procurement (Missiles)	2032	N/A	3020	N/A
Procurement (Tracks)	2033	1507	N/A	N/A
Procurement (Ammunition)	2034	1508	3011	N/A
Shipbuilding & Conversion	N/A	1611	N/A	N/A
Other Procurement	2035	1810/1109	3080	0300
RDT&E	2040	1319	3600	0400
Military Construction	2050	1205	3300	0500
Family Housing Constr.	0702	0703	7040	0706
Reserve Construction	2086	1235	3730	N/A
National Guard Constr.	2085	N/A	3830	N/A
Environmental Restoration		0810	0810	0810
Wildlife Conservation	5095	5095	5095	N/A

*Operations and Maintenance: This appropriation funds the operation and maintenance of most Army activities and facilities.

IV. LIMITATIONS ON THE USE OF APPROPRIATED FUNDS.

A. General Limitations.

1. The authority of executive agencies to spend appropriated funds is limited.
2. An agency may obligate and expend appropriations only for a proper **purpose**.
3. An agency may obligate only within the **time** limits applicable to the appropriation (e.g., O&M funds are available for obligation for one fiscal year).
4. An agency must obligate within the **amounts** appropriated by Congress and formally distributed to or by the agency.

B. Limitations Based Upon Purpose.

1. The “Purpose Statute,” (31 U.S.C. § 1301(a)) provides that agencies shall apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law.
2. Three-Part Test for a Proper Purpose. Secretary of Interior, B-120676, 34 Comp. Gen. 195 (1954).
 - a. Expenditure of appropriations must be for a specified purpose, or **necessary and incident** to the proper execution of the general purpose of the appropriation.
 - b. The expenditure must not be prohibited by law.
 - c. The expenditure must not be otherwise provided for, i.e., it must not fall within the scope of some other appropriation.

3. Appropriations Acts. DOD has nearly one hundred separate appropriations available to it for different purposes.
 - a. Appropriations are differentiated by service (Army, Navy, etc.), component (Active, Reserve, etc.), and purpose (Procurement, Research and Development, etc.). The major DOD appropriations provided in the annual Appropriations Act are:
 - (1) Operation and Maintenance -- used for the day-to-day expenses of training exercises, deployments, operating and maintaining installations, etc.;
 - (2) Personnel -- used for military pay and allowances, permanent change of station travel, etc.;
 - (3) Research, Development, Test and Evaluation (RDT&E) -- used for expenses necessary for basic and applied scientific research, development, test, and evaluation, including maintenance and operation of facilities and equipment; and
 - (4) Procurement -- used for production and modification of aircraft, missiles, weapons, tracked vehicles, ammunition, shipbuilding and conversion, and “other procurement.”
 - b. DOD also receives smaller appropriations for other specific purposes (e.g., Overseas Humanitarian, Disaster, and Civic Aid (OHDACA), Chemical Agents and Munitions Destruction, etc.).
 - c. Congress appropriates funds separately for military construction.
4. Authorization Acts.
 - a. Annual authorization acts generally precede DOD’s appropriations acts.

- b. The authorization act may clarify the intended purposes of a specific appropriation, or contain restrictions on the use of the appropriated funds.

5. Legislative History.

- a. Legislative history is not legislation, but rather is the record of congressional deliberations that precede the passage of a statute. When confronted with a statute plain and unambiguous on its face, courts ordinarily do not look to the legislative history as a guide to its meaning. Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).
- b. The legislative history is not necessarily binding upon the Executive Branch. If Congress provides a lump sum appropriation without restricting what may be done with the funds, a clear inference is that it did not intend to impose legally binding restrictions. SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30; LTV Aerospace Corp., B-183851, Oct. 1, 1975, 75-2 CPD ¶ 203.


6. The Necessary Expense Rule.

- a. The Purpose Statute does not require Congress to specify every item of expenditure in an appropriation act, although it does specify the purpose of many expenditures. DOD has reasonable discretion to determine how to accomplish the purpose of an appropriation.
- b. The standard for measuring the propriety of a particular expenditure, if not specified in the statute, is:
 - (1) Whether it is reasonably necessary to carry out an authorized function; or
 - (2) Whether it will contribute materially to the effective accomplishment of that function. Internal Revenue Serv. Fed. Credit Union – Provision of Automatic Teller Mach., B-226065, 66 Comp. Gen. 356 (1987).

- c. A necessary expense does not have to be the only way, or even the best way, to accomplish the object of an appropriation. A necessary expense, however, must be more than merely desirable. Utility Costs under Work-at-Home Programs, B-225159, 68 Comp. Gen. 505 (1989).

C. Limitations Based upon Time. 31 U.S.C. § 1502(a).

- 1. Appropriations are available for limited periods. An agency must incur a legal obligation to pay money within the period of availability. If an agency fails to obligate funds before they expire, they are no longer available for new obligations.
 - a. Expired funds retain their “fiscal year identity” for five years after the end of the period of availability. During this time, the funds are available to adjust existing obligations, or to liquidate prior valid obligations, but not to incur new obligations.
 - b. There are several important exceptions to the general prohibition against obligating funds after the period of availability.
 - (1) Protests. 31 U.S.C. § 1558. This statutory provision is incorporated at FAR 33.102(c).
 - (2) Terminations for default. See Lawrence W. Rosine Co., B-185405, 55 Comp. Gen. 1351 (1976).
 - (3) Terminations for convenience, pursuant to a court order or agency determination of erroneous award. Navy, Replacement Contract, B-238548, 91-1 CPD ¶ 117; Matter of Replacement Contracts, B-232616, 68 Comp. Gen. 158 (1988).
- 2. Appropriations are available only for the bona fide need of an appropriation’s period of availability. 31 U.S.C. § 1502(a). See Magnavox -- Use of Contract Underrun Funds, B-207453, Sept. 16, 1983, 83-2 CPD ¶ 401; To the Secretary of the Army, B-115736, 33 Comp. Gen. 57 (1953).

3. In analyzing the bona fide need for a given item or service, the following factors are appropriate for consideration:
 - a. The required delivery date in the contract.
 - b. The normal rate of consumption.
 - c. When the government will make facilities, sites, or tools available.
 - d. Whether the government controls when the contractor may begin the work.
 - e. Normal weather conditions when planning for outdoor construction or renovation projects.
4. Supplies.
 - a.  Supplies are generally the bona fide need of the period in which they are needed or consumed. Orders for supplies are proper only when the supplies are actually required. Thus, supplies needed for operations during a given fiscal year are bona fide needs of that year. To Betty F. Leatherman, Dep't of Commerce, B-156161, 44 Comp. Gen. 695 (1965).
 - b. There are two exceptions to the foregoing general rule.
 - (1) Stock level exception. A bona fide need for supplies exists when there is a present requirement for supply items to meet authorized stock levels (replenishment of operating stock levels, safety levels, mobilization requirements, authorized backup stocks, etc.). DOD Financial Management Regulation 7000.14-R, vol. 3, chapter 8., para. 080303A.

- (2) Lead-time exception. Goods or materials may not be readily available when required because of the lead time necessary to order, produce, fabricate, and deliver them. Activities may purchase long-lead items in one FY, even though the items will not be used until needed in the next FY. Chairman, Atomic Energy Commission, 37 Comp. Gen. 155, 159 (1957).

5. Services.

- a. Most service contracts are “severable” and, hence, bona fide needs of the fiscal year in which they are performed. Examples are janitorial, gardening, and transportation services. Absent a statutory exception (discussed below) As a general rule, use current funds to obtain current services, and do not use current funds to obtain future services.
- b. There are statutory exceptions to the general rule. 10 U.S.C. § 2410a permits DOD agencies to award severable service contracts for a period not to exceed 12 months at any time during the fiscal year, funded completely with current appropriations. This statutory exception essentially swallows the general rule. Non-DOD agencies have similar authority. 41 U.S.C. § 253l. For the Coast Guard the authority is found in 10 U.S.C. § 2410a(b).
- c. If the services are **nonseverable**, i.e., for a single undertaking, agencies must obligate funds for the entire undertaking at contract award, even though performance will occur during the next fiscal year. See Incremental Funding of U.S. Fish & Wildlife Serv. Research Work Orders, B-240264, 73 Comp. Gen. 77 (1994) (work on an environmental impact statement properly crossed fiscal years).


D. Limitations Based upon Amount.

1. The Antideficiency Act, 31 U.S.C. §§ 1341-44, 1511-17, prohibits any government officer or employee from:

- a. Making or authorizing an expenditure or obligation in excess of the amount available in an appropriation. 31 U.S.C. § 1341(a)(1)(A).
 - b. Making or authorizing expenditures or incurring obligations in excess of formal subdivisions of funds; or in excess of amounts permitted by regulations prescribed under 31 U.S.C. § 1514(a). See 31 U.S.C. § 1517(a)(2).
 - c. Incurring an obligation in advance of an appropriation, unless authorized by law. 31 U.S.C. § 1341(a)(1)(B).
 - d. Accepting voluntary services, unless otherwise authorized by law. 31 U.S.C. § 1342.
2. Investigating violations. If a violation occurs, the agency must investigate to identify the responsible individual. The agency must report the violation to Congress through the Secretary of the Army. Violations could result in administrative and/or criminal sanctions. See DOD 7000.14-R, vol. 14.
- a. The commander must submit a flash report within fifteen working days of discovery of the violation.
 - b. The MACOM commander must appoint a “team of experts,” including members from the financial management and legal communities, to conduct a preliminary investigation.
 - c. If the preliminary report concludes a violation occurred, the MACOM commander will appoint an investigative team to determine the cause of the violation and the responsible parties. Investigations are conducted pursuant to AR 15-6, Procedure for Investigating Officers and Boards of Officers.
 - d. The head of the agency must report to the President and Congress whenever a violation of 31 U.S.C. §§ 11(a), 1342, or 1517 is discovered. OMB Cir. A-34, para. 32.2; DOD 7000.14-R, Vol. 14, ch. 7, para. A.

3. Individuals responsible for an Antideficiency Act violation shall be sanctioned commensurate with the circumstances and the severity of the violation. See DOD 7000.14-R, Vol. 14, ch. 9; see also 31 U.S.C. §§ 1349(a).

V. TYPICAL QUESTIONABLE EXPENSES AND COMMON PROBLEMS

- A. Agencies may have  specific guidance about “questionable” expenditures. See, e.g., AFI 65-601, Budget Guidance and Procedures, vol. 1., ch. 4, §§ K-O (24 December 2002).
- B. Clothing. Buying clothing for individual employees generally does not materially contribute to an agency’s mission performance. Clothing is, therefore, generally considered a personal expense unless a statute provides to the contrary. See IRS Purchase of T-Shirts, B-240001, 70 Comp. Gen. 248 (1991) (Combined Federal Campaign T-shirts for employees who donated five dollars or more per pay period not authorized).
 1. Statutorily-Created Exceptions. See 5 U.S.C. § 7903 (authorizing purchase of special clothing, for government benefit, which protects against hazards); 10 U.S.C. § 1593 (authorizing DOD to pay an allowance or provide a uniform to a civilian employee who is required by law or regulation to wear a prescribed uniform while performing official duties); and 29 U.S.C. § 668 (requiring federal agencies to provide certain protective equipment and clothing pursuant to OSHA). See also Purchase of Insulated Coveralls, Vicksburg, Mississippi, B-288828, Oct. 3, 2002 (unpub.); Purchase of Cold Weather Clothing, Rock Island District, U.S. Army Corps of Eng’s, B-289683, Oct. 7, 2002 (unpub.) (both providing an excellent overview of each of these authorities).
 2. Opinions and Regulations On-point. See also White House Communications Agency—Purchase or Rental of Formal Wear, B-247683, 71 Comp. Gen. 447 (1992) (authorizing tuxedo rental or purchase); Internal Revenue Serv.—Purchase of Safety Shoes, B-229085, 67 Comp. Gen. 104 (1987) (authorizing safety shoes); DOD FMR vol. 10, ch. 12, para. 120220; AR 670-10, Furnishing Uniforms or Paying Uniform Allowances to Civilian Employees, (1 July 1980).

- C. Food. Buying food for individual employees – at least those who are not away from their official duty station on travel status – generally does not materially contribute to an agency’s mission performance. As a result, food is generally considered a personal expense. See Department of The Army—Claim of the Hyatt Regency Hotel, B-230382, Dec. 22, 1989 (unpub.) (determining coffee and donuts to be an unauthorized entertainment expense).
1. GAO-sanctioned exception where food is included as part of a facility rental cost. GAO has indicated that it is all right for agencies to pay a facility rental fee that includes the cost of food if the fee is all inclusive, non-negotiable, and comparably priced to the fees of other facilities that do not include food as part of their rental fee. See Payment of a Non-Negotiable, Non-Separable Facility Rental Fee that Covered the Cost of Food Service at NRC Workshops, B-281063, Dec. 1, 1999 (unpub.).
 2. Regulatory-based “Light Refreshments” Exception. Through 27 January 2003, federal agencies commonly paid for “light refreshments” at government-sponsored conferences under a regulatory exception found in the travel regulations where a majority of the attendees were from a different permanent duty station than the sponsoring activity. See Federal Travel Regulation, Part 301-74 (found at: <http://www.policyworks.gov/org/main/mt/homepage/mtt/FTR/ch301-74.html>). See also Joint Federal Travel Regulation (JFTR), ch. 2, para. U2550; Joint Travel Regulation (JTR), ch. 4, para. C4950. The JFTR as well as the JTR may be found at: <http://www.dtic.mil/perdiem/trvlregs.html>. That exception was recently overturned, at least with respect to paying for the refreshments given to any personnel not on travel status. See Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266, Jan. 27, 2003 (unpub.).
 3. Statutory-based Exceptions.
 - a. Basic Allowance for Subsistence. Under 37 U.S.C. § 402, DOD may pay service members a basic allowance for subsistence.

- b. Formal Meetings and Conferences. Under 5 U.S.C. § 4110, the government may pay for meals while government employees are attending meetings or conferences if: 1) the meals are incidental to the meeting; 2) attendance of the employees at the meals is necessary for full participation in the meeting; and 3) the employees are not free to take meals elsewhere without being absent from the essential business of the meeting.
- (1) This exception does **not apply to purely internal business meetings or conferences sponsored by government agencies**. See Pension Benefit Guar. Corp.—Provision of Food to Employees, B-270199, 1996 U.S. Comp. Gen. LEXIS 402 (Aug. 6, 1996); Meals for Attendees at Internal Gov’t Meetings, B-230576, 68 Comp. Gen. 604 (1989).
- (2) This exception also does **not apply to military members (it applies only to civilian employees)**. But see JFTR, ch. 4, para. U4510, which authorizes military members to be reimbursed for occasional meals within the local area of their Permanent Duty Station (PDS) when the military member is required to procure meals at personal expense outside limits of the PDS.
- c. Training. Under 5 U.S.C. § 4109 (applicable to civilian employees) and 10 U.S.C. §§ 4301 and 9301 (applicable to service members), the government may provide meals if necessary to achieve the objectives of a training program. See Coast Guard—Meals at Training Conference, B-244473, Jan. 13, 1992 (unpub.).
- (1) The GAO and other auditors will not merely defer to an agency’s characterization of a meeting as “training.” Instead, they will closely scrutinize the event to ensure it was a valid training activity and that the food was actually necessary to achieve the objectives of that training. See Corps of Eng’rs—Use of Appropriated Funds to Pay for Meals, B-249795, May 12, 1993 (unpub.) (determining that quarterly managers meetings of the Corps did not constitute “training”); See also Pension Benefit Guar. Corp.—Provision of Food to Employees, *supra*. (determining that food was not needed for employee to obtain the full benefit of training).

- (2) This exception is often utilized to provide small "samples" of ethnic foods during an ethnic or cultural awareness program. See Army — Food Served at Cultural Awareness Celebration, B-199387, 1982 U.S. Comp. Gen. LEXIS 1284 (Mar. 23, 1982). See also AFI 65-601, vol. 1, para. 4.26.1.2.

d. Award Ceremonies. Under 5 U.S.C. §§ 4503-4504 (civilian incentive awards) and 10 U.S.C. § 1124 (military cash awards), federal agencies may “incur necessary expenses” including purchasing food to honor an individual that is given an award made on the basis of one or more of the above statutory authorities.

- (1) Relevant GAO Opinions. Defense Reutilization and Mktg. Serv. Award Ceremonies, B-270327, 1997 U.S. Comp. Gen. LEXIS 104 (Mar. 12, 1997) (authorizing the agency expending \$20.00 per attendee for a luncheon given to honor awardees under the Government Employees Incentive Awards Act); Refreshments at Awards Ceremony, B-223319, 65 Comp. Gen. 738 (1986) (agencies may use appropriated funds to pay for refreshments incident to employee awards ceremonies [applies to both 5 U.S.C. § 4503 and 10 U.S.C. § 1124] which expressly permit agency to “incur necessary expense for the honorary recognition. . .”).

- (2) Relevant Regulations. Awards to civilian employees must be made in accordance with 5 C.F.R. Part 451. Awards to DOD civilians must also be done in accordance with DoD 1400.25-M, subchapter 451 as well as DOD FMR, vol. 8, ch. 3, para. 0311 (Aug. 1999). For Army civilians, the award must also be made in accordance with AR 672-20, Incentive Awards (29 January 1999) and DA Pam 672-20, Incentive Awards Handbook (1 July 1993). For Air Force civilians, the award must also be made in accordance with AF Pam 36-2861, Civilian Recognition Guide (1 June 2000). See also AFI 65-601, vol. 1, para. 4.31.

- (3) **NOTE:** 10 U.S.C. § 1125 governs the Secretary of Defense's (SECDEF) authority to award medals, trophies, badges, etc. to service members. This statute does not have the express "incur necessary expense" language of 5 U.S.C. § 4503 or 10 U.S.C. § 1124. Therefore, food may not be purchased with appropriated funds and served at an awards ceremony conducted solely under the authority of 10 U.S.C. § 1125.

4. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to pay for receptions for distinguished visitors. See discussion *infra* Part X of this chapter for an overview.

D. **Bottled Water.** Bottled water generally does not materially contribute to an agency's mission accomplishment. It is therefore generally a personal expense.

1. **GAO-Sanctioned Exception Where Water is Unpotable.** Agencies may use appropriated funds to buy bottled water where a building's water supply is unwholesome or unpotable. See United States Agency for Int'l Dev.—Purchase of Bottled Drinking Water, B-247871, 1992 U.S. Comp. Gen. LEXIS 1170 (Apr. 10, 1992) (problems with water supply system caused lead content to exceed "maximum contaminant level" and justified purchase of bottled water until problems with system could be resolved).
2. **Relevant Regulations.** See also DOD FMR, vol. 10, ch. 12, para. 120203 (permitting the purchase of water where the public water is unsafe or unavailable); AFI 65-601, vol. 1, para. 4.45 (discussing the same); AR 30-22, para. 5-19 (discussing the need to obtain approval from HQDA prior to purchasing bottled water, even in the context of a deployment / contingency).

E. **Workplace Food Storage and Preparation Equipment** (i.e. microwave ovens; refrigerators; coffee pots). Buying food storage and/or preparation equipment generally does not materially contribute to an agency's mission performance. As a result, these items are generally considered to be a personal expense. Under a "necessary expense" analysis, the GAO has sanctioned the use of appropriated funds to buy food storage and preparation equipment when the purchase is "reasonably related to the efficient performance of agency activities, and not just for the personal convenience of individual employees."

1. In the past, the Comptroller General opined that buying food storage and/or preparation equipment generally did not materially contribute to an agency's mission performance. As a result, these items were generally considered to be a personal expense.

2. Under a "necessary expense" analysis, the GAO sanctioned the use of appropriated funds to buy food storage and preparation equipment only when the purchase was "reasonably related to the efficient performance of agency activities, and not just for the personal convenience of individual employees." This situation generally arose only when there were no commercial eating facilities available in the location, or when employees worked extended hours and restaurants were not open during much of this time. See e.g., Central Intelligence Agency-Availability of Appropriations to Purchase Refrigerators for Placement in the Workplace, B-276601, 97-1 CPD ¶ 230 (determining that commercial facilities were not proximately available when the nearest one was a 15-minute commute away from the federal workplace); Purchase of Microwave Oven, B-210433, 1983 U.S. Comp. Gen. LEXIS 1307 (Apr. 15, 1983) (determining commercial facilities were unavailable when employees worked 24 hours a day, seven days a week and restaurants were not open during much of this time).

3. In June, 2004 the GAO revisited this issue and determined that regardless of the availability of commercial eating facilities, food storage and/or preparation equipment did reasonably relate to the efficient performance of agency activities, and thus appropriated funds could be spent for these items. See Use of Appropriated Funds to Purchase Kitchen Appliances, B-302993 (June 25, 2004). In support of this decision, the Comptroller General observed that these items reasonably related to workplace safety in that, as a result of fire safety measures, employees were not allowed to have coffee makers in their workspace areas. However, the opinion went beyond the issue of safety by noting that providing such equipment results in benefits for the agency, "including increased employee productivity, health, and morale, that when viewed together, justify the use of appropriated funds to acquire the equipment." Further, the Comptroller General noted that purchasing such equipment "is one of many small but important factors that can assist federal agencies in recruiting and retaining the best work force and supporting valuable human capital policies." (Note: agency level regulations and policies should be consulted prior to applying this decision.)

- F. **Personal Office Furniture and Equipment.** Ordinary office equipment is reasonably necessary to carry out an agency's mission so appropriated funds may be used to purchase such items so long as they serve the needs of the majority of that agency's employees. If the equipment serves the needs of only a single individual or a specific group of individuals, then it is considered a personal expense rather than a "necessary expense" of the agency. This is true even if the equipment is essential for a particular employee to perform his or her job. Under such a scenario, it is the needs of that particular individual(s) that causes the item to be necessary. The item is not "essential to the transaction of official business from the Government's standpoint." Internal Revenue Service—Purchase of Air Purifier with Imprest Funds, B-203553, 61 Comp. Gen. 634 (1982) (disapproving reimbursement for air purifier to be used in the office of an employee suffering from allergies); See also Roy C. Brooks—Cost of special equipment-automobile and sacro-ease positioner, B-187246, 1977 U.S. Comp. Gen. LEXIS 221 (Jun. 15, 1977) (disapproving reimbursement of special car and chair for employee with a non-job related back injury); Cf. Office of Personnel Mgt.—Purchase of Air Purifiers, B-215108, July 23, 1984, 84-2 CPD ¶ 194 (allowing reimbursement for air purifiers to be used in common areas thus benefiting the needs of all building occupants).
1. **Federal Supply Schedule Exception.** If the desired equipment is available from off of the Federal Supply Schedule, the agency may use appropriated funds to purchase it even if the chair does not serve the needs of the majority of workers. See Purchase of Heavy Duty Office Chair, B-215640, 1985 U.S. Comp. Gen. LEXIS 1805 (Jan. 14, 1985) (allowing reimbursement for a heavy-duty office chair normally used only by air traffic controllers since the chair was available from off of the Federal Supply Schedule).

2. Exception Based Upon Statutory Authority. The Rehabilitation Act of 1973, found at 29 U.S.C. § 701 et seq., requires federal agencies to implement programs to expand employment opportunities for handicapped individuals. The regulations implementing this Act require agencies to make “reasonable accommodations” to include purchasing special equipment or devices in order to carry out these programs. See 29 C.F.R. 32.3. Thus, agencies may use appropriated funds to purchase equipment for its **qualified handicap employees** if doing so is a reasonable accommodation. See Use of Appropriated Funds to Purchase a Motorized Wheelchair for a Disabled Employee, B-240271, 1990 U.S. Comp. Gen. LEXIS 1128 (Oct. 15, 1990) (authorizing purchase); see also Equal Employment Opportunity Commission—Special Equipment for Handicapped Employees, B-203553, 63 Comp. Gen. 115 (1983) (affirming prior opinion in which GAO had determined agency could not purchase air purifiers for person with allergies since the agency had not demonstrated the person met the regulatory definition of a handicap individual).

G. Entertainment. Entertaining people generally does not materially contribute to an agency’s mission performance. As a result, entertainment expenses are generally considered to be a personal expense. See HUD Gifts, Meals, and Entm’t Expenses, B-231627, 68 Comp. Gen. 226 (1989); Navy Fireworks Display, B-205292, Jun. 2, 1982, 82-2 CPD ¶ 1 (fireworks unauthorized entertainment).

1. Statutory-based Exceptions. Congress does occasionally provide permanent or one-time authority to entertain. See Claim of Karl Pusch, B-182357, Dec. 9, 1975 (unpub.) (Foreign Assistance Act authorized reimbursement of expenses incurred by Navy escort who took foreign naval officers to Boston Playboy Club—twice); Golden Spike Nat’l Historic Site, B-234298, 68 Comp. Gen. 544 (1989) (discussing authority to conduct “interpretive demonstrations” at the 1988 Annual Golden Spike Railroader’s Festival).
2. Agencies may use appropriated funds to pay for entertainment (including food) in furtherance of equal opportunity training programs. Internal Revenue Serv.—Live Entm’t and Lunch Expense of Nat’l Black History Month, B-200017, 60 Comp. Gen. 303 (1981) (determining a live African dance troupe performance conducted as part of an Equal Employment Opportunity (EEO) program was a legitimate part of employee training).

3. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to entertain distinguished visitors to the agency. See discussion *infra* Part X of this chapter for an overview. See also To The Honorable Michael Rhode, Jr., B-250884, March 18, 1993 (unpub.) (interagency working meetings, even if held at restaurants, are not automatically social or quasi-social events chargeable to the official reception and representation funds).
- H. Decorations. Under a “necessary expense” analysis, GAO has sanctioned the use of appropriated funds to purchase decorations so long as they are modestly priced and consistent with work-related objectives rather than for personal convenience. See Department of State & Gen. Serv. Admin.—Seasonal Decorations, B-226011, 67 Comp. Gen. 87 (1987) (authorizing purchase of decorations); Purchase of Decorative Items for Individual Offices at the United States Tax Court, B-217869, 64 Comp. Gen. 796 (1985) (modest expenditure on art work consistent with work-related objectives and not primarily for the personal convenience or personal satisfaction of a government employee proper); But see The Honorable Fortney H. Stark, B-217555, 64 Comp. Gen. 382 (1985) (determining Christmas cards were not a proper expenditure because they were for personal convenience). See also AFI 65-601, vol. 1, para. 4.26.2. NOTE: Practitioners should consider also the constitutional issues involved in using federal funds to purchase and display religious decorations (e.g., Christmas, Hanukkah, etc.)
- I. Business Cards. Under a “necessary expense” analysis, the GAO has recently sanctioned the use of appropriated funds to purchase business cards for agency employees. See Letter to Mr. Jerome J. Markiewicz, Fort Sam Houston, B-280759, Nov. 5, 1998 (purchase of business cards with appropriated funds for government employees who regularly deal with public or outside organizations is a proper “necessary expense”).
1. This case “overturned” a long history of Comptroller General’s decisions holding that business cards were a personal expense because they did not materially contribute to an agency’s mission accomplishment. See, e.g., Forest Serv.—Purchase of Info. Cards, B-231830, 68 Comp. Gen. 467 (1989).
 2. Army Policy. Army Regulation 25-30, para. 7-11 (15 May 2002). Army policy authorizes the printing of business cards at government expense.

- a. Business cards must be necessary to perform official duties and to facilitate business communications. When appropriated funds are used, individual offices are responsible for funding the cost of procuring business cards. Cards will be procured using the most economical authorized method.
 - b. Commercially printed business cards are authorized but are restricted generally to designated investigators and recruiters. A Brigadier General (BG) or SES equivalent must approve commercial procurement and printing of business cards. Cards commercially procured with appropriated funds will be procured through the Document Automated Printing Service. Such cards must be limited to a single ink color, unless a BG or SES equivalent has granted an exception and only when the use of more than one color provides demonstrable value and serves a functional purpose. Department of the Army memorandum, dated 2 August 1999, however, permits agencies to procure printed business cards from the Lighthouse for the Blind if the cost of procuring the cards is equivalent to or less than the cost of producing the cards on a personal computer.
 - c. Agencies must use existing hardware and software to produce cards and must use card stock that may be obtained through in-house or commercial supply channels.
3. Air Force Policy. AFI 65-601, vol. 1, para. 4.36. Appropriated funds may be used for the printing of business cards, using personal computers, existing software and agency-purchased card stock, for use in connection with official communications. Additionally, the purchase of business cards from the Lighthouse for the Blind, Inc., a Javits-Wagner-O'Day participating non-profit agency, is authorized when the organization determines that costs are equivalent or less to purchase cards rather than to produce them on a personal computer. The instruction allows certain agencies to purchase cards commercially for recruiting duties.

J. Telephones. Even though telephones might ordinarily be considered a “necessary expense,” appropriated funds may not generally be used to install telephones in private residences or to pay the utility or other costs of maintaining a telephone in a private residence. Congress decided to prohibit government phones in personal residences because their use was subject to great abuse. See 31 U.S.C. § 1348. See also Centers for Disease Control and Prevention—Use of Appropriated Funds to Install Tel. Lines in Private Residence, B-262013, Apr. 8, 1996, 96-1 CPD ¶ 180 (appropriated funds may not be used to install telephone lines in Director’s residence); Use of Appropriated Funds to Pay Long Distance Tel. Charges Incurred by a Computer Hacker, B-240276, 70 Comp. Gen. 643 (1991) (agency may not use appropriated funds to pay the phone charges, but may use appropriated funds to investigate).

1. Exceptions for DOD and State Department. The above prohibition does not apply to the installation, repair, or maintenance of telephone lines in residences owned or leased by the U.S. Government. It also does not apply to telephones in private residences if the SECDEF determines they are necessary for national defense purposes. See 31 U.S.C. § 1348(a)(2) and (c). See also Timothy R. Manns—Installation of Tel. Equip. in Employee Residence, B-227727, 68 Comp. Gen. 307 (1989) (telephone in temporary quarters allowed). DOD may install telephone lines in the residences of certain volunteers who provide services that support service members and their families, including those who provide medical, dental, nursing, or other health-care related services as well as services for museum or natural resources programs. See 10 U.S.C. § 1588(f).
2. Exception for data transmission lines. If the phone will be used to transmit data, the above prohibition does not apply. See Federal Communications Comm’n—Installation of Integrated Servs. Digital Network, B-280698, Jan. 12, 1999 (unpub.) (agency may use appropriated funds to pay for installation of dedicated Integrated Services Digital Network (ISDN) lines to transmit data from computers in private residences of agency’s commissioners to agency’s local area network).

3. Cell Phones. The above prohibition only applies to phones installed in a personal residence and therefore does not prevent an agency from purchasing cell phones for its employees, if they are otherwise determined to be a necessary expense. Agencies may also reimburse their employees for the costs associated with any official government usage of personal cell phones, but such reimbursement must cover the actual costs – not the estimated costs – of the employee. See Reimbursing Employees' Government Use of Private Cellular Phones at a Flat Rate B-287524, Oct. 22, 2001 (unpub.) (indicating that the agency may not, however, pay the employees a flat amount each month – in lieu of actual costs – even if the calculation of that flat amount is made using historical data).
 4. Exception for teleworking. In 1996, Congress authorized federal agencies to install telephones and other *necessary equipment* in personal residences for purposes of teleworking. See Pub. L. No. 104-52, § 620. Congress also required the Office of Personnel Management (OPM) to develop guidance on teleworking that would be applicable to all federal agencies. That guidance may be found at: <http://www.opm.gov/wrkfam/telecomm/telecomm.htm>. The Air Force also has some additional guidance found in AFI 65-601, vol I, para 4.24.6.
- K. Fines and Penalties. The payment of a fine or penalty generally does not materially contribute towards an agency's mission accomplishment. Therefore, fines and penalties imposed on government employees and service members are generally considered to be their own personal expense and not payable using appropriated funds.
1. Exception Based Upon "Necessary Expense" Rule. If, in carrying out its mission, an agency forces one of its employees to take a certain action which incurs a fine or penalty, that fine or penalty may be considered a "necessary expense" and payable using appropriated funds. Compare To The Honorable Ralph Regula, B-250880, Nov. 3, 1992 (military recruiter is personally liable for fines imposed for parking meter violations because he had the ability to decide where to park and when to feed the meter); with To The Acting Attorney Gen., B-147769, 44 Comp. Gen. 313 (1964) (payment of contempt fine proper when incurred by employee forced to act pursuant to agency regulations and instructions).

2. Note: Agencies may also pay fines imposed on the agency itself if Congress waives sovereign immunity. See, e.g., 10 U.S.C. § 2703(f) (Defense Environmental Restoration Account); 31 U.S.C. § 3902 (interest penalty).
- L. Licenses and Certificates. Employees are expected to show up to work prepared to carry out their assigned duties. As a result, fees that an employee incurs to obtain a license or certificate enabling them to carry out their duties are considered a personal expense rather than a “necessary expense” of the government. See A. N. Ross, B-29948, 22 Comp. Gen. 460 (1942) (fee for admission to Court of Appeals not payable). See also AFI 65-601, vol. 1, para. 4.47.
1. Exception—When the license is primarily for the benefit of the government and not to qualify the employee for his position. National Sec. Agency—Request for Advance Decision, B-257895, Oct. 28, 1994 (unpub.) (drivers’ licenses for scientists and engineers to perform security testing at remote sites); Air Force—Appropriations—Reimbursement for Costs of Licenses or Certificates, B-252467, June 3, 1994, (unpub.) (license necessary to comply with state-established environmental standards).
 2. Potential Legislative Exception. Section 1112 of the 2002 National Defense Authorization Act, Pub. L. No. 107-107, 115 Stat. 1654 (2001), adds 5 U.S.C. §5757 permitting agencies to reimburse the following expenses that their **competitive service employees** incur:
 - a. professional accreditation;
 - b. state-imposed professional licenses;
 - c. professional certification; and

- d. the costs of any examinations required to obtain such credentials.

3. On 20 June 2003 the Assistant Secretary of the Army (Manpower and Reserve Affairs) issued a memorandum to MACOM Commanders authorizing payment for professional credentials, as permitted in 5 U.S.C. § 5757. This authority may be redelegated at the discretion of the MACOM Commanders. This memorandum is available at: <http://www.asmccertification.com/documents/Army-Reimbursement-Policy-20030620.pdf>. See also: <http://www.hq.usace.army.mil/cehr/d/traindevelop/USACE-credentials-policy-aug03.pdf> (Corps of Engineers implementing guidance).

M. Awards (Including Unit or Regimental Coins and Similar Devices). Agencies generally may not use their appropriated funds to purchase “mementos” or personal gifts. See EPA Purchase of Buttons and Magnets, B-247686, 72 Comp. Gen. 73 (1992)(requiring a direct link between the distribution of the gift or memento and the purpose of the appropriation in order to purchase the item with appropriated funds). Congress has enacted various statutory schemes permitting agencies to give awards, however. These include:

- 1. Awards For Service Members. Congress has provided specific statutory authority for SECDEF to “award medals, trophies, badges, and similar devices” for “excellence in accomplishments or competitions.” 10 U.S.C. § 1125.
 - a. The Army has implemented this statute in AR 600-8-22, Military Awards (25 Feb. 1995). The bulk of this regulation deals with the typical medals and ribbons issued to service members (i.e. the Army Achievement Medal, the Meritorious Service Medal, the Purple Heart, etc).
 - b. Chapter 11 of the regulation allows the presentation of other nontraditional awards for “excellence in accomplishments and competitions which clearly contribute to the increased effectiveness or efficiency of the military unit, that is, tank gunnery, weapons competition, military aerial competition.”
 - c. These awards must “be made on a one time basis where the achievement is unique and clearly contributes to increased effectiveness.” See AR 600-8-22, para. 11-2.

- d. Theoretically, these awards could be made in the form of a coin, a trophy, a plaque, or a variety of other “similar devices.” The MACOM commander or head of the principal HQDA agency must approve the purchase of the particular item to be awarded, however. See AR 600-8-22, para. 1-7d. See also Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, B-247687, 71 Comp. Gen. 346 (1992) (approving the use of appropriated funds to purchase belt buckles as awards for the annual "Peacekeeper Challenge").
 - e. Specific Issues Concerning Unit or Regimental Coins. For a detailed discussion of the issues related to commanders’ coins, see Major Kathryn R. Sommercamp, *Commanders’ Coins: Worth Their Weight in Gold?*, ARMY LAW., Nov. 1997, at 6.
 - f. The Air Force and Navy/Marine Corps have similar awards guidance. See generally AFPD 36-28, Awards and Decorations Programs, (1 Aug. 1997); SECNAVINST 3590.4A, Award of Trophies and Similar Devices in Recognition of Accomplishments (28 Jan. 1975). See also AFI 65-601, vol. 1, para. 4.29; OpJAGAF 1999/23, 1 Apr. 1999.
2. Awards For Civilian Employees. Congress has provided agencies with various authorities to pay awards to their employees. See Chapter 45 of Title 5 of the U.S. Code. The most often utilized authority used as a basis to issue an award to a civilian employee is that found at 5 U.S.C. § 4503, permitting
- a. Regulatory Implementation of this Authority. Awards to civilian employees must be made in accordance with 5 C.F.R. Part 451. Awards to DOD civilians must also be done in accordance with DoD 1400.25-M, subchapter 451 as well as DOD FMR, vol. 8, ch. 3, para. 0311 (Aug. 1999). For Army civilians, the award must also be made in accordance with AR 672-20, Incentive Awards (29 January 1999) and DA Pam 672-20, Incentive Awards Handbook (1 July 1993). For Air Force civilians, the award must also be made in accordance with AF Pam 36-2861, Civilian Recognition Guide (1 June 2000).

- b. Non-Cash Awards. The statute technically states that the “head of an agency **may pay a cash award** to, and incur necessary expense for the honorary recognition of” one of their employees. The plain reading of this statute implies that non-cash awards, such as plaques and coins, are not authorized to be given to civilian employees. The agency regulations each expressly permit non-cash awards, however. Curiously, the GAO has sanctioned the giving of non-cash awards to civilian employees. See Awarding of Desk Medallion by Naval Sea Sys. Command, B-184306, Aug. 27, 1980 (unpub.) (desk medallions may be given to both civilian and military as awards for suggestions, inventions, or improvements). As discussed *supra*, the GAO has also sanctioned the purchase of food as one of the expenses that it deems could be necessary to honor the awardees accomplishments. In such circumstances, the award is not the food just an incidental expense incurred to honor the awardee.
3. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to purchase mementoes for their distinguished visitors. See discussion *infra* Part X of this chapter for an overview.
- N. Use of Office Equipment. Use of Office Equip. in Support of Reserves and Nat’l Guard, B-277678, Jan. 4, 1999 (agency may authorize use of office equipment to respond to reserve unit recall notification as all government agencies have some interest in furthering the governmental purpose of, and national interest in, the Guard and Reserves). See Office of Personnel Management memorandum, subject: Use of Official Time and Agency Resources by Federal Employees Who Are Members of the National Guard or Armed Forces Reserves (3 June 1999), which provides general guidance to assist federal agencies in determining under what circumstances employee time and agency equipment may be used to carry out limited National Guard or Reserve functions. An electronic copy of this memorandum may be found at: http://www.defenselink.mil/dodgc/defense_ethics/ethics_regulation/OPMReserves.htm. See also CAPT Samuel F. Wright, *Use of Federal Government Equipment and Time for Reserve Unit Activities*, RESERVE OFFICERS ASS’N L. REV., May 2001 (found at: http://www.roa.org/home/law_review_25.asp) (providing a good overview of this authority).

O. Improper Augmentation of Appropriations.

1. General rule -- Augmentation of appropriations is prohibited.

- a. Augmentation is action by an agency that increases the effective amount of funds available in an agency's appropriation. This generally results in expenditures by the agency in excess of the amount originally appropriated by Congress.



- b. Basis for the augmentation rule. Augmentation normally violates one or more of the following provisions:

- (1) The United States Constitution, Article I, § 9, Clause 7: “No money shall be drawn from the treasury except in consequence of appropriations made by law.”
- (2) 31 U.S.C. § 1301(a) (Purpose Statute): “Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”
- (3) 31 U.S.C. § 3302(b) (Miscellaneous Receipts Statute): “Except as . . . [otherwise provided] . . . an official or agent of the government receiving money for the government from any source shall deposit the money in the Treasury as soon as practical without any deduction for any charge or claim.”

P. Expense/Investment Threshold Issues.


1. Expenses are costs of resources consumed in operating and maintaining DOD, and are normally financed with O&M appropriations. See DOD Reg. 7000.14-R, vol. 2A, ch 1. Expenses generally include:

- a. Labor of civilian, military, or contractor personnel;
- b. Rental charges for equipment and facilities;

- c. Food, clothing, and fuel;
 - d. Maintenance, repair, overhaul, and rework of equipment;
 - e. Real property maintenance, repair, and O&M-funded minor construction projects; and
 - f. Assemblies, spare and repair parts, and other items of equipment not designated for centralized management and costing less than \$250,000.
2. Investments are the acquisition costs of DOD capital assets and are normally financed with procurement appropriations. These costs benefit future periods and tend to have a long-term character. Investments generally include:
- a. All items of equipment, including assemblies, ammunition, explosives, modification kits, and spares and repair parts not managed by the Defense Working Capital Fund (formerly Defense Business Operations Fund), that are subject to centralized item management;
 - b. All equipment items having a system unit cost equal to or greater than \$250,000; and
 - c. Construction, including equipment installed and made an integral part of the facilities.
3. Past audits revealed problems with activities using O&M funds to acquire computer systems that exceeded the expense/investment threshold. This constitutes a violation of the Purpose Statute and may result in a violation of the Antideficiency Act. DOD Reg. 7000.14-R, vol. 2A, ch. 1, para. 010201D and DFAS-IN 37-100-02, Appendix A provide special guidance for information technology (IT) purchases.

- a. Agencies must consider the “system” concept when evaluating the procurement of IT end items. The determination of what constitutes a “system” must be based on the primary function of the hardware and software to be acquired, as stated in the approved requirements document.
- b. A system exists if a number of components are designed primarily to function within the context of a whole and will be interconnected to satisfy an approved requirement.
- c. Agencies may purchase multiple end items of equipment (e.g., computers), and treat each end item as a separate “system” for funding purposes, if the primary function of the end item is to operate independently.
- d. Include standard off-the-shelf software as part of the total system cost when purchased as part of initial acquisition of equipment.
- e. Fragmented or piecemeal acquisition of a documented requirement may not be used to circumvent the “system” concept.

Q. Military Construction.

- 1. Congressional oversight of the Military Construction Program is extensive and pervasive. For example, no public contract relating to erection, repair, or improvements to public buildings shall bind the government for funds in excess of the amount specifically appropriated for that purpose. 41 U.S.C. § 12. 
- 2. There are different categories of construction work with distinct funding requirements.
- 3. Specified Military Construction (MILCON) Program -- projects costing over \$1.5 million.
 - a. Congress authorizes these projects by location and funds them in a lump sum by service.

- b. Congressional reports identify individual projects specifically.
- 4. Unspecified Minor Military Construction (MMC) Program -- military construction projects costing between \$750,000 and \$1.5 million.
10 U.S.C. § 2805(a).
 - a. Congress provides annual funding and approval to each military department for minor construction projects that are not specifically identified in a Military Construction Appropriations Act.
 - b. The Service Secretary concerned uses these funds for minor projects not specifically approved by Congress.
 - c. Statute and regulations require approval by the Secretary of the Department and notice to Congress before a minor military construction project exceeding \$750,000 is commenced.
 - d. If a military construction project is intended solely to correct a deficiency that is life-threatening, health-threatening, or safety-threatening, an unspecified minor military construction project may have an approved cost equal to or less than \$1.5 million.
- 5. Minor Military Construction projects costing less than \$750,000.
10 U.S.C. § 2805(c); DOD Dir. 4270.36; AR 415-15, para. 1-6.c.(1).
 - a. Services fund these projects with O&M appropriations.
 - b. Construction includes alteration, conversion, addition, expansion, and replacement of existing facilities, plus site preparation and installed equipment.

- c. The \$750,000 limitation applies to each minor construction project. A project includes all work necessary to produce a complete and usable facility, or a complete and usable improvement to an existing facility. The limit is increased to \$1.5 million in the case of an unspecified minor military construction project intended solely to correct a deficiency that is life-threatening, health-threatening, or safety-threatening. 10 U.S.C. § 2801(b).
 - d. Project splitting is prohibited. The Honorable Michael B. Donley, B-234326.15, Dec. 24, 1991 (unpub.) (Air Force improperly split into multiple projects, a project involving a group of twelve related buildings).
 - e. Using O&M funds for construction in excess of the \$750,000 project limit violates the Purpose Statute and may result in a violation of the Antideficiency Act. See DOD Accounting Manual 7220.9-M, Ch. 21, para. E.4.e; AFR 177-16, para. 23c; The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).
6. Maintenance and repair projects.
- a. DOD funds these projects with O&M appropriations.
 - b. “Maintenance” is work required to preserve and maintain a real property facility in such condition that it may be used effectively for its designated functional purpose. Maintenance includes work done to prevent damage which would be more costly to restore than to prevent. Maintenance includes work to sustain components. Examples include renewal of disposable filters, painting, caulking, refastening loose siding, and sealing bituminous pavements. “Preventive maintenance” (PM) is routine, recurring work performed on all real property facilities. PM is systematic inspection, care, and servicing of equipment, utility plants and systems, buildings, structures, and grounds facilities for detecting and correcting incipient failures and accomplishing minor maintenance. See AR 420-10, Glossary.
 - c. DOD guidance. Memorandum, Office of the Secretary of Defense, Comptroller, 2 July 97, subject: Definition for Repair and Maintenance.

- (1) Repair means to restore a real property facility, system, or component to such a condition that it may be used effectively for its designated purpose.
- (2) When repairing a facility, the components of the facility may be repaired by replacement, and the replacement may be up to current standards or codes. For example, Heating, Ventilation, and Air Conditioning (HVAC) equipment may be repaired by replacement, be state-of-the-art, and provide for more capacity than the original unit due to increased demand/standards. Interior rearrangements (except for load-bearing walls) and restoration of an existing facility to allow for effective use of existing space or to meet current building code requirements (*e.g.*, accessibility, health safety, or environmental) may be included as repair.
- (3) Additions, new facilities, and functional conversions must be done as construction. Construction projects may be done concurrently with repair projects as long as the work is separate and segregable.

d. Army guidance. See AR 420-10, Management of Installation Directorates of Public Works; see also DA Pamphlet 420-11, Project Definition and Work Classification.

- (1) A facility must be in a failed or failing condition to be considered for a repair project.
- (2) When repairing a facility you may bring it (or a component of a facility) up to applicable codes or standards as repair. An example would be adding a sprinkler system as part of a barracks repair project. Another example would be adding air conditioning to meet a current standard when repairing a facility. Moving load-bearing walls, additions, new facilities, and functional conversions must be done as construction.

- (3) Bringing a facility (or component thereof) up to applicable codes or standards for compliance purposes only, when a component or facility is not in need of repair, is construction.
 - e. When construction and maintenance or repair are performed together as an integrated project, each type of work is funded separately unless the work is so integrated that separation of construction from maintenance and repair is not possible. In the latter case, fund all work as construction.
 - f. Improperly classifying work as maintenance or repair, rather than construction, may lead to exceeding the \$750,000 project limit.
7. Exercise-related construction. See The Honorable Bill Alexander, B-213137, Jan. 30, 1986 (unpub.); The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).
- a. Congress has prohibited the use of O&M for minor construction outside the U.S. on Joint Chiefs of Staff (JCS) directed exercises.
 - b. All exercise-related construction projects coordinated or directed by the JCS outside the U.S. are limited to unspecified minor construction accounts of the Military Departments. Furthermore, Congress has limited the authority for exercise-related construction to no more than \$5 million per Department per fiscal year. 10 U.S.C. § 2805(c) (2). Currently, Congress funds exercise-related construction as part of the Military Construction, Defense Agencies, appropriation.
 - c. DOD's interpretation excludes from the definition of exercise-related construction only truly temporary structures, such as tent platforms, field latrines, shelters, and range targets that are removed completely once the exercise is completed. DOD funds the construction of these temporary structures with O&M appropriations.

R. Combat and Contingency Related O&M Funded Construction. Within the last year, significant changes have taken place in the funding of combat and contingency

related construction. In order to understand the current state of the law it is necessary to examine these changes as they have taken place.

1. Prior to April 2003, per Army policy, use of O&M funds in excess of the \$750,000 threshold discussed above was proper when erecting structures/facilities in direct support of combat or contingency operations declared pursuant to 10 U.S.C. § 101(a)(13)(A). See Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, Department of the Army, Subject: Construction of Contingency Facility Requirements (22 Feb. 2000). This policy applied only if the construction was intended to meet a temporary operational need that facilitated combat or contingency operations. The rationale for this opinion was that O&M funds were the primary funding source supporting contingency or combat operations; therefore, if a unit was fulfilling legitimate requirements made necessary by those operations, then use of O&M appropriations was proper.

2. On 27 February 2003, DoD issued similar guidance. See Memorandum, Under Secretary of Defense, (Comptroller), Subject: Availability of Operation and Maintenance Appropriations for Construction, (27 Feb. 2003). The DoD memorandum, in effect, adopted the Army's policy as articulated in the 22 February 2000 memorandum at the DoD level.

3. On 16 April 2003 the President signed the Emergency Wartime Supplemental Appropriation for the Fiscal Year 2003, Pub. L. No. 108-11, 117 Stat. 587 (2003). The act's accompanying conference report stated, in rather harsh language, the conferees' legal objections to the Under Secretary of Defense (Comptroller)'s 27 February 2003 policy memorandum. The conference report had the practical effect of invalidating the policy guidance articulated in both the 22 February 2000 Deputy General Counsel (Ethics & Fiscal), Department of the Army Memorandum, as well as the 27 February 2003 Under Secretary of Defense (Comptroller) Memorandum.

4. On 6 November 2003 the President signed the Emergency Supplemental Appropriation for Defense and for the Reconstruction of Iraq and Afghanistan for Fiscal Year 2004, Pub. L. No. 108-106, 117 Stat. 1209 (2003). Section 1301 of the act provided "temporary authority" for the use of O&M funds for military construction projects during FY 04 where the Secretary of Defense determines:

a) the construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forces in support of Operation Iraqi Freedom or the Global War on Terrorism;

b) the construction is not carried out at a military installation where the United States is reasonably expected to have a long-term presence;

c) the United States has no intention of using the construction after the operational requirements have been satisfied; and,

d) the level of construction is the minimum necessary to meet the temporary operational requirements. Pursuant to the act, this temporary funding authority was limited to \$150 million.

5. On 24 November 2003, the President signed the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1723 (2003). Section 2808 of the authorization act increased the amount of O&M funds DoD could spend on contingency and combat related construction in FY 04 to \$200 million, and adopted, unchanged, the determination requirements of the 04 Emergency Supplemental Appropriation .

6. On 1 April 2004, the Deputy Secretary of Defense issued implementing guidance for Section 2808 of the FY 2004 Defense Authorization Act. See Memorandum, Deputy Secretary of State, Subject: Use of Operation and Maintenance Appropriations for Construction during Fiscal Year 2004 (1 April 2004). Pursuant to this guidance, Military Departments or Defense Agencies are to submit candidate construction projects exceeding \$750,000 to the Under Secretary of Defense (Comptroller). The request will include a description and the estimated cost of the project, and include a certification by the Secretary of the Military Department or Director of the Defense Agency that the project meets the conditions stated in Section 2808 of the FY 04 Defense Authorization Act. The Under Secretary of Defense (Comptroller) will review the candidate projects in coordination with the Under Secretary of Defense (Acquisition, Technology, and Logistics), and the Under Secretary of Defense (Comptroller) will notify the Military Department or Defense Agency when to proceed with the construction project. The memorandum provides a draft format to be used for project requests, and is available at: <http://www.acq.osd.mil/dpap/Docs/policy/use%20of%20operation%20and%20maintenance%20appropriations%20for%20construction%20during%20fy2004.pdf>

- S. Bottom Line. As a result of recent congressional developments, DoD can no longer fund combat and contingency related construction projects costing in excess of \$750,000 without first identifying clear, affirmative legislative authority. Section 2808 of the FY 04 Defense Authorization Act provides such authority. However, this authority is of limited in scope, funding and duration. Where this will leave the DOD in future years, or when the \$200 million limit is spent is an open question. Improper Year-End Spending.
1. Overstocking supplies.
 2. Entering into contracts for maintenance, repair, and construction although work cannot begin until the spring.
 3. Inappropriate offloading using interagency orders.
 - a. Several statutes authorize federal agencies to obtain goods and services from other agencies. See 31 U.S.C. § 1535 (Economy Act); 41 U.S.C. § 23 (Project Order Statute); see also FAR Subpart 17.5; DFARS Subpart 217.5.
 - b. Activities must avoid using interagency acquisitions to circumvent the law. See, e.g., DOD Inspector General Audit Report Nos. 94-008 (Oct. 20, 1993), 93-068 (Mar. 18, 1993), 93-042 (Jan. 21, 1993), 92-069 (Apr. 3, 1992), 90-085, (June 19, 1990).
 - c. Improper to “bank” an agency’s annual funds with a GSA account to cover future year needs. Matter of: Implementation of the Library of Congress FEDLINK Revolving Fund, B-288142, Sep. 6, 2001; Matter of: Continued Availability of Expired Appropriation for Additional Project Phases, B-286929, Apr. 25, 2001.

VI. CONCLUSION.

